

1 Leonard H. Stone Esq.
2 Nevada Bar No. 5791
3 SHOOK & STONE, CHTD.
4 710 South Fourth Street
5 Las Vegas, Nevada 89101
6 Tel: (702) 385-2220

7 Adam J. Levitt (admitted *pro hac vice*)
8 GRANT & EISENHOFER P.A.
9 30 North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Tel: (312) 214-0000

10 Attorneys for Plaintiff
11 (additional counsel appear on signature block)

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM BRIDGE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

CREDIT ONE FINANCIAL, A Nevada
Corporation d/b/a CREDIT ONE BANK,
N.A.,

Defendant.

Case No. 2:14-cv-01512-LDG-NJK

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION FOR LEAVE TO FILE THIRD-
PARTY COMPLAINT**

Dated: February 23, 2015

TABLE OF CONTENTS

	Page
3 TABLE OF AUTHORITIES	ii
4 I. INTRODUCTION	1
5 II. BACKGROUND OF THE MOTION	1
6 III. ARGUMENT	4
7 A. LEGAL STANDARD	4
8 B. DEFENDANT'S PROPOSED THIRD PARTY CLAIMS ARE NOT DEPENDENT 9 UPON PLAINTIFF'S ORIGINAL CLAIMS.	5
10 C. PLAINTIFF WILL SUFFER PREJUDICE IF THE MOTION IS GRANTED.	7
11 D. IMPLAIDING A HOST OF COMMON LAW CLAIMS AGAINST A THIRD PARTY 12 WILL SIGNIFICANTLY COMPLICATE THE ISSUES FOR TRIAL.....	7
13 E. IMPLAIDING A THIRD PARTY WILL RESULT IN SUBSTANTIAL TRIAL 14 DELAY.	8
15 F. DEFENDANT'S MOTION IS UNTIMELY.....	9
16 G. DEFENDANT'S THIRD-PARTY COMPLAINT FAILS TO STATE A CLAIM UNDER 17 RULE 12.....	9
18 1. Jurisdiction and Venue.....	10
19 2. Count I (Indemnity).	11
20 3. Count II (Breach of Contract for Default).	11
21 4. Count III (Breach of the Covenant of Good Faith and Fair Dealing)....	12
22 5. Count IV (Negligence).....	12
23 6. Count V (Fraud).	13
24 7. Count VI (Negligent Misrepresentation).	13
25 8. Count VII (Declaratory Judgment).	14
26 IV. CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	10, 11
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	10, 11
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	6, 7
<i>Helperich Patent Licensing, LLC v. Legacy Partners, LLC</i> , 917 F. Supp. 2d 985 (D. Ariz. 2013)	9
<i>Irwin v. Mascott</i> , 94 F. Supp. 2d 1052 (N.D. Cal. 2000)	4, 5, 6
<i>Khalsa v. Hali</i> , No. 5:13-cv-03575-PSG, 2014 WL 3883713 (N.D. Cal. Aug. 6, 2014)	14
<i>Lehman v. Revolution Portfolio, LLC</i> , 166 F.3d 389 (1st Cir. 1999).....	10
<i>Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.</i> , 299 F.3d 643 (7th Cir. 2002)	10
<i>McSherry v. Capital One FSB</i> , 236 F.R.D. 516 (W.D. Wash. 2006)	6
<i>Neilson v. Union Bank of Calif. N.A.</i> , 290 F. Supp. 2d 1101 (C.D. Cal. 2003)	13
<i>Ruggieri v. Hartford Ins. Co. of the Midwest</i> , No. 2:13-cv-00071-GMN-GWF, 2013 WL 2896967 (D. Nev. June 12, 2013)	12
<i>Stewart v. Am. Intl. Oil & Gas Co.</i> , 845 F.2d 196 (9th Cir. 1988)	4, 5
<i>Sw. Admin., Inc. v. Rozay's Transfer</i> , 791 F.2d 769 (9th Cir. 1986)	4
<i>TransFresh Corp. v. Ganzerla & Assoc., Inc.</i> , 862 F. Supp. 2d 1009 (N.D. Cal. 2012)	13
<i>U.S. v. Miners Contracting & Support, Inc.</i> , No. 3:13-cv-00203-MMD-VPC, 2014 WL 293438 (D. Nev. Jan. 24, 2014).....	10

1	<i>Zero Tolerance Ent., Inc. v. Ferguson,</i> 254 F.R.D. 123 (C.D. Cal. 2008).....	9
2	STATUTES	
3	15 U.S.C. § 78u-4(f)(8).....	6
4	28 U.S.C. § 1332.....	10
5	Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (“FDCPA”).....	6
6	Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).....	passim
7	OTHER AUTHORITIES	
8	C.A. WRIGHT & A.R. MILLER, 6 FED. PRAC. & PROC. § 1446.....	4
9	Fed. R. Civ. P. 9(b)	13, 14
10	Fed. R. Civ. P. 12.....	9, 11
11	Fed. R. Civ. P. 14.....	passim
12	Fed. R. Civ. P. 23.....	1
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Plaintiff William Bridge (“Plaintiff”), by his undersigned counsel, respectfully submits
2 this memorandum of law in opposition to Defendant Credit One Financial d/b/a Credit One
3 Bank, N.A.’s (“Defendant” or “Credit One”) motion for leave to file a third-party complaint
4 against Nancy Bridge (Dkt. No. 30) (the “Motion”).

5 **I. INTRODUCTION**

6 This is a class action lawsuit brought pursuant to the Telephone Consumer Protection
7 Act, 47 U.S.C. § 227 (“TCPA”). Through its three recent and nearly simultaneously-filed
8 motions, Defendant has begun to reveal an odious litigation strategy: obstruct, delay, and
9 intimidate. After attempting, by its motion for protective order (Dkt. No. 28), to prevent Plaintiff
10 from obtaining virtually any of the discovery necessary for Plaintiff to discharge his burden of
11 showing typicality, commonality, ascertainability, and predominance under Federal Rule of Civil
12 Procedure 23 and, by its motion to stay pursuant to the primary jurisdiction doctrine (Dkt. No.
13 27), to prevent the litigation from proceeding at all, Defendant now seeks leave to file a third-
14 party complaint against Plaintiff’s elderly mother in order to harass and intimidate Plaintiff into
15 withdrawing his complaint. It is eminently clear that Defendant will do whatever it takes –
16 however misguided and incorrect – to avoid litigating this case on the merits. Indeed, even a
17 cursory review of the proposed third-party complaint against Plaintiff’s mother reveals fatal
18 flaws that go entirely unaddressed in Defendant’s Motion and the complaint itself. For the
19 reasons set forth herein, Defendant’s Motion must be denied.

20 **II. BACKGROUND OF THE MOTION**

21 The Motion follows, by one week, Defendant’s filing of two other, equally meritless
22 motions designed only to frustrate the course of this litigation. Rightly apprehensive about its
23 chances of obtaining a protective order shielding Defendant from class-related discovery (Dkt.
24 No. 28) or staying the litigation (Dkt. No. 27), Defendant promptly filed the present request to
25 sue Plaintiff’s mother for a host of inapplicable causes of action. As demonstrated herein,
26 however, Defendant has no chance of success on the merits against Nancy Bridge. Defendant’s
27 actual purpose in seeking leave to file its complaint against Ms. Bridge, however, has *nothing* to
28

1 do with its likelihood of success on the merits, and *everything* to do with harassing and
 2 intimidating Plaintiff into withdrawing his claims against Defendant.

3 In its proposed third-party complaint, Defendant alleges that if Plaintiff succeeds in the
 4 present action, then Plaintiff's mother, Ms. Bridge, would be liable to Defendant for its legal fees
 5 in defending against Plaintiff's suit, as well as for the amount of any recovery to which Plaintiff
 6 and the other Class members are entitled. Even putting aside the obvious *non sequiturs* on which
 7 Defendant's entire theory relies – that a corporation can avoid its own liability under a federal
 8 law with no intent requirement by claiming that it acted in reliance on misinformation allegedly
 9 provided by another person (and which was apparently not fact-checked or confirmed in any
 10 way), and that any person has a cognizable duty to help a corporation avoid liability under such a
 11 federal law – the defects in Defendants' proposed third-party complaint are glaring.

12 *First*, Nancy Bridge is a New York resident with no conceivable relationship to this
 13 jurisdiction or venue. The third-party complaint should be rejected on this ground alone.
 14 Moreover, the proposed third-party complaint asserts no federal cause of action and fails to
 15 demonstrate that the amount in controversy exceeds \$75,000, depriving the suit of subject matter
 16 jurisdiction as well.

17 *Second*, the proposed third-party complaint incorporates Plaintiff's complaint by
 18 reference (*see* Dkt. No. 30, Exh. A at ¶39). Plaintiff's complaint alleges that, "in the Fall of
 19 2013, Plaintiff instructed the Credit One representative [on one call received on Plaintiff's
 20 cellular phone] that he had no relationship with Credit One, and that Credit One should not
 21 contact him on his cellular telephone any more." Dkt. No. 1 at ¶24 (emphasis added). Yet
 22 Defendant's proposed third-party complaint alleges that it began making collections calls to
 23 Plaintiff's cellular phone number "in early 2014," and that "no individual answered a phone call
 24 [at Plaintiff's number] until March 18, 2014," at which point Credit One was "directed ... not to
 25 place any further calls to the number." Dkt. No. 30, Exh. A at ¶¶27-28. Thus, by its own
 26 admission, prior to the course of events narrated in Defendant's proposed third-party complaint,
 27 Defendant had already learned that any purported "consent" to be contacted at Plaintiff's number
 28 had been revoked.

1 *Third*, Defendant does not even attempt to allege or demonstrate how the “consent” it
 2 purportedly received from Nancy Bridge to make auto-dialed calls to Plaintiff’s cellular phone
 3 number on January 18, 2014 satisfies the TCPA’s demanding “consent” criteria. Instead,
 4 Defendant merely assumes that, because it inserted in its standard Cardholder Agreement a
 5 pliable – and effectively meaningless – provision to the effect that phone numbers from which
 6 cardholders make calls to Defendant constitutes consent to be called at such numbers, it has
 7 properly secured the consent of the caller to receive auto-dialed calls under the TCPA. That is
 8 demonstrably incorrect. The TCPA requires “prior express written consent,” which has been
 9 interpreted to require written consent for specific phone numbers. Defendant points to *no*
 10 *document evincing such consent* made on behalf of Nancy Bridge, and readily admits that no
 11 such document exists. Thus, Defendant never secured the requisite prior express written consent
 12 from Nancy Bridge, at least with respect to Plaintiff’s cellular phone number. More
 13 fundamentally, because Nancy Bridge is legally incapable of consenting to receive auto-dialed
 14 calls on Plaintiff’s cellular phone number, Defendant’s entire proposed third-party complaint is a
 15 vacuous exercise.

16 In the very best possible world for Defendant, assuming every fact in its proposed third-
 17 party complaint to be true and assuming that every legal obstacle identified above (pertaining to
 18 jurisdiction and venue, revocation of consent, and inadequacy of alleged consent) has somehow
 19 been neutralized, Defendant may *conceivably* be entitled to recover from Nancy Bridge for any
 20 statutory damages owed to *Plaintiff alone* arising out of its auto-dialed calls to Plaintiff’s cellular
 21 phone number between January 18, 2014 (when it represents it obtained “consent” from Nancy
 22 Bridge) and March 18, 2014 (when it represents it was instructed not to make any further calls to
 23 Plaintiff’s cellular phone number). Under no circumstances can Defendant seek indemnification
 24 or damages from Nancy Bridge for any other violation of the TCPA, regardless of when such
 25 violations occurred, and regardless of whether such amounts would be due to Plaintiff or to other
 26 Class members.

27

28

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 Defendant's Motion is governed by Rule 14, which requires "the court's leave" prior to
 4 filing any third-party complaint after fourteen days have elapsed since the defendant served its
 5 answer. Fed. R. Civ. P. 14(a). Rule 14 does not dispense with basic requirements of personal
 6 jurisdiction, subject matter jurisdiction, or proper venue. Neither does Rule 14 permit the filing
 7 of third-party complaints that are filed in order to intimidate, harass, or retaliate against another
 8 party. The decision whether to permit filing of a third-party complaint is committed to the sound
 9 discretion of the trial court. *Sw. Admin., Inc. v. Rozay's Transfer*, 791 F.2d 769, 777 (9th Cir.
 10 1986).

11 The first consideration in any Rule 14(a) analysis is whether the proposed third-party
 12 complaint asserts a claim that is "dependent" upon the claims presently before the Court.
 13 *Stewart v. Am. Intl. Oil & Gas Co.*, 845 F.2d 196, 199-200 (9th Cir. 1988) (dismissing third-
 14 party complaint for failure to show dependence of third-party claims on original claims); *see also*
 15 C.A. WRIGHT & A.R. MILLER, 6 FED. PRAC. & PROC. § 1446 (the third-party claim "cannot
 16 simply be an independent or related claim but must be based upon plaintiff's claim against
 17 defendant. The crucial characteristic of a Rule 14 claim is that defendant is attempting to
 18 transfer to the third-party defendant the liability asserted against him by the original plaintiff.
 19 The mere fact that the alleged third-party claim arises from the same transaction or set of facts as
 20 the original claim is not enough.").

21 The purpose of Rule 14 is the promotion of judicial efficiency. *Id.* However, courts
 22 consider a number of factors in determining whether to grant Rule 14 motions, including: "(a)
 23 prejudice to the original plaintiff; (2) complication of issues at trial; (3) likelihood of trial delay;
 24 and (4) timeliness of the motion to implead." *Irwin v. Mascott*, 94 F. Supp. 2d 1052, 1056 (N.D.
 25 Cal. 2000) (citing *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 439 n.6 (3d Cir.
 26 1971), *cert. denied* 405 U.S. 1017 (1972)). In addition to these factors, courts also consider
 27 whether the proposed third-party complaint "allege[s] a cause of action for which relief may be
 28 granted," because "[i]t makes no sense to permit such a potentially prejudicial expansion of the

1 case at the expense of [p]laintiffs, if the third-party plaintiffs do not have a valid theory of relief
 2 against the third-party defendants.” *Id.* at 1057-58.

3 **B. Defendant’s Proposed Third Party Claims Are Not Dependent Upon**
 4 **Plaintiff’s Original Claims.**

5 The hallmark of a Rule 14(a) claim is that it is completely dependent upon the original
 6 claim asserted by the plaintiff in the underlying action. *Stewart*, 845 F.2d at 199-200; *Irwin*, 94
 7 F. Supp. 2d at 1056. Defendant does not even argue that its seven causes of action against
 8 Nancy Bridge are dependent upon Plaintiff’s claims against Defendant. Rather, Defendant
 9 argues that “a part of Ms. Bridge’s liability [to Defendant] will turn in large part on the same set
 10 of facts that are at issue in Plaintiff’s case against Credit One.” Def. Br. at 5. That is insufficient
 11 to satisfy the demanding Rule 14(a) standard set forth above.

12 Further, even if Defendant had taken the trouble to research the law and to explain how
 13 its request is grounded in controlling legal principles – which, Plaintiff reminds the Court,
 14 Defendant clearly did not do – Defendant’s entire theory of liability, under any of its seven
 15 causes of action, rests on a series of untenable propositions that make granting the Motion an
 16 impossibility. Key among these is that Defendant assumes it is entitled to pawn its violations of
 17 law off on third parties on the thin premise that it “relied” on information supplied by such third
 18 parties (like Nancy Bridge) in conducting its business – apparently without verifying,
 19 confirming, or otherwise fact-checking that information prior to using it to violate the law. But
 20 there is simply no defense of reliance on third parties in the TCPA.¹ Nor did Congress see fit to
 21 include provisions in the TCPA for contribution or indemnity. Thus, the third-party complaint is
 22 not dependent on Plaintiff’s claims – even partially.

23

24 ¹ Nor should there be: Defendant has a duty to take steps to ensure its business practices do not
 25 violate federal law, regardless of what anyone – including its accountants, its lawyers, its
 26 customers, and/or the Chamber of Commerce – tells it to do or not do. As Plaintiff alleged,
 27 “Through the TCPA, Congress and the FCC have imposed a simple requirement upon persons
 28 making commercial telephone communications: call the telephone number *without auto-dialing
 equipment and without an artificial or prerecorded voice messages*, unless and until the consent
 of the call recipient to receive auto-dialed or artificial and prerecorded voice calls is secured.”
 Dkt. No. 1 at ¶20 (emphasis in original).

1 Magistrate Judge Larson of the Northern District of California considered a strikingly
 2 similar situation in a case brought under the federal Fair Debt Collection Practices Act
 3 (“FDCPA”). *See Irwin*, 94 F. Supp. 2d at 1056. In *Irwin*, the defendant debt collector sought
 4 leave, under Rule 14(a), to file a third-party complaint against its counsel, whom it allegedly
 5 relied upon in deciding to take certain actions that, according to plaintiff, violated the FDCPA.
 6 *Id.* Judge Larson explained that, because the FDCPA has no “intent” element, reliance on third
 7 parties, including counsel, is no defense to an FDCPA claim. *Id.* at 1057. Denying the
 8 defendant’s Rule 14(a) motion, the *Irwin* court explained, “The third-party legal malpractice
 9 action would not be dependent on [p]laintiffs’ claims against [d]efendants, since good faith
 10 reliance on the advice of counsel would not be a defense to liability.” *Id.* That case is instructive
 11 because, like the FDCPA, the TCPA has no “intent” element – intent is relevant only to
 12 determine the extent of damages, in that negligent violations are met with a statutory \$500 per
 13 incident damages award while knowing or willful violations entitle the plaintiff to up to \$1,500
 14 per incident. *See* 47 U.S.C. § 227(b)(3). Accordingly, the *Irwin* court’s reasoning holds in this
 15 case as well. Because Defendant’s intent in calling Plaintiff’s cellular phone number is
 16 irrelevant to Defendant’s TCPA liability, its proposed third-party claims are not dependent upon
 17 Plaintiff’s claims. Consequently, Rule 14 does not permit the filing of Defendant’s proposed
 18 third-party complaint.

19 Furthermore, the TCPA contains no language expressly providing for contribution or
 20 indemnity. Congress knows how to create such provisions. *See, e.g.*, 15 U.S.C. § 78u-4(f)(8)
 21 (providing for contribution in securities litigation). The fact that Congress declined to do so here
 22 suggests, consistent with Supreme Court precedent that it did not intend to extend the benefits of
 23 contribution and indemnification to the class of entities sought to be regulated by the statutory
 24 scheme. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also McSherry v. Capital One FSB*,
 25 236 F.R.D. 516 (W.D. Wash. 2006) (discussing *Cort* factors in analysis of request for
 26 contribution or indemnification under federal statute that does not provide such). In addition,
 27 Plaintiff, a consumer with no prior or existing business relationship with Defendant, is clearly
 28 within the class for whose benefit the TCPA was enacted, and the remedy of contribution or

1 indemnification sought by Defendant is just as clearly inconsistent with the TCPA's purpose of
 2 restricting the use of invasive and harassing technologies in telemarketing and debt collection.
 3 Thus, the *Cort* factors do not support creation of the remedy Defendant demands here.

4 To the extent Defendant contends its request for contribution or indemnification is not in
 5 any way founded on the TCPA itself, but on its purported contractual agreement with Nancy
 6 Bridge, the outcome of the analysis is unchanged. Even if the Cardholder Agreement alleged by
 7 Defendant to constitute an enforceable contract between Defendant and Nancy Bridge were
 8 legally binding – which it is not – the indemnification provision cannot fairly be read in the
 9 recklessly broad sense suggested by Defendant. Indeed, that provision refers to “any collection
 10 costs and attorneys’ fees, including our in-house attorneys’ costs, that Credit One Bank incurs as
 11 a result of your default.” *See* Dkt. No. 30, Exh. A to Exh. A at ¶20. The costs of this litigation,
 12 including Holland & Hart LLP’s fees and any judgment Plaintiff secures individually or on
 13 behalf of the other Class members, are not “collection costs.” Thus, this provision, on its very
 14 face, does nothing for Defendant but lend it false security.

15 **C. Plaintiff Will Suffer Prejudice If The Motion Is Granted.**

16 Defendant’s Motion is a transparent intimidation tactic that is, on its merits, factually and
 17 legally baseless. This is a concrete form of prejudice that has no legitimate place in federal
 18 litigation. However, prejudice in the Rule 14 context concerns the propensity of the Motion to
 19 derail the progress of the litigation. Such propensity clearly exists here.

20 **D. Impleading A Host Of Common Law Claims Against A Third Party Will
 21 Significantly Complicate The Issues For Trial.**

22 The causes of action to be tried in this matter are limited to two violations of the TCPA
 23 (for negligent and knowing or willful violations) and one violation of the Nevada Deceptive
 24 Trade Practices Act’s prohibition on unlawful activity. All such causes of action pertain
 25 exclusively to Defendant’s business practices in contacting purported debtors. Once a class is
 26 certified, trial of this matter on Defendant’s liability will be brief, simple, and uncomplicated.

27 By contrast, Defendant’s proposed third-party complaint asserts the following causes of
 28 action against Nancy Bridge: (1) indemnity; (2) breach of contract for default; (3) breach of the

1 covenant of good faith and fair dealing; (4) negligence; (5) fraud; (6) negligent
 2 misrepresentation; (7) declaratory judgment. *See* Dkt. No. 30, Exh. A at ¶¶38-75. These widely
 3 varying and heavily fact-sensitive causes of action threaten to seriously detract attention from the
 4 core issues to be tried. In addition, were the case to be expanded in the dramatic fashion that
 5 Defendant demands, the taking of evidence regarding the elements of each of these seven claims
 6 would be required. Litigant and judicial resources would be consumed at a rate much higher
 7 under Defendant's proposed third-party complaint than under the action as it presently stands.
 8 Rather than enhance it, therefore, impleading these causes of action will undermine judicial
 9 efficiency. This suffices to deny Defendant's Motion on the grounds that it frustrates Rule 14's
 10 very purpose.

11 **E. Impleading A Third Party Will Result In Substantial Trial Delay.**

12 The Court has already bifurcated discovery into class- and merits-based phases, and has
 13 already established a discovery and briefing schedule concerning Plaintiff's class certification
 14 motion. *See* Dkt. No. 24 ("Scheduling Order"). Injecting into this case seven new common-law
 15 theories of liability against a third party is a recipe for disaster in terms of progress, and will
 16 certainly produce a substantial delay in trying this matter.

17 As noted above, in section III.D, allowing impleader of seven causes of action only
 18 tenuously and circuitously related to the two statutory claims presently in issue will require a
 19 significant amount of additional discovery. Beyond the additional discovery, however, the
 20 claims themselves also require resolution of significant legal and factual questions not presently
 21 before the Court in any manner, such as, among other things, the enforceability and the scope of
 22 Defendant's purported indemnification clause in its Cardholder Agreement (Count I –
 23 Indemnification), Nancy Bridge's intent in allegedly making a phone call from Plaintiff's phone
 24 (Count V – Fraud; Count VI – Negligent Misrepresentation), and the circumstances behind
 25 Nancy Bridge's alleged failure to pay a credit card bill (Count II – Breach of Contract for
 26 Default). When a trial eventually occurs, it will be, in essence, the trial of a case entirely
 27 different than the one presently before the Court. Certainly, the parties will not be prepared to
 28

1 try that new case any time soon. The substantial delay imposed by the proposed third-party
 2 complaint suffices to deny Defendant's Motion.

3 Further, it bears noting that Defendant's proposed third-party complaint would, if
 4 permitted to be filed, render void this Court's order bifurcating discovery. This fact also suffices
 5 to deny the Motion, which should be granted *only if* it facilitates and enhances judicial economy
 6 and efficiency, rather than destroy it.

7 **F. Defendant's Motion Is Untimely.**

8 Defendant has been anything but diligent in preparing its Motion. Roughly three weeks
 9 after Plaintiff filed his complaint (September 17, 2014), Defendant contacted Plaintiff, under the
 10 guise of settlement negotiations, to instruct Plaintiff that Defendant's violation of the TCPA in
 11 calling Plaintiff's cellular phone number was allegedly a result of Nancy Bridge's provision of
 12 prior express written consent to be called at that number. Thus, since at least October 7, 2014,
 13 Defendant understood (incorrectly) that Nancy Bridge was, according to the flawed theories
 14 presented in the proposed third-party complaint, partly liable for its unlawful behavior. And yet
 15 Defendant waited approximately ***120 days*** to seek leave to file its proposed third-party complaint
 16 – *after* the Court had bifurcated discovery, *after* the Court had set a schedule for discovery and
 17 briefing of Plaintiff's class certification motion, *after* the parties had begun conducting discovery
 18 on Plaintiff's claims. This inexcusable delay renders the Motion untimely. *See, e.g., Helperich*
 19 *Patent Licensing, LLC v. Legacy Partners, LLC*, 917 F. Supp. 2d 985, 989 (D. Ariz. 2013)
 20 (finding delay of "more than five months" sufficient to deny Rule 14(a) motion as untimely);
 21 *Zero Tolerance Ent., Inc. v. Ferguson*, 254 F.R.D. 123, 128 (C.D. Cal. 2008) (finding delay of
 22 "over three months" sufficient to deny Rule 14(a) motion as untimely).

23 **G. Defendant's Third-Party Complaint Fails To State A Claim Under Rule 12.**

24 Defendant's proposed third-party complaint would, if filed, be subject to dismissal for
 25 lack of personal jurisdiction as to third-party defendant Nancy Bridge, a New York resident with
 26 no connection to Nevada whatsoever, as well as improper venue for the same reason, and lack of
 27 subject matter jurisdiction because the amount in controversy does not exceed \$75,000. Further,
 28 each cause of action Defendant seeks to assert in its proposed third-party complaint fails to state

1 a claim. All causes of action in Defendant's proposed third-party complaint are subject to the
 2 plausibility pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),
 3 and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *U.S. v. Miners Contracting & Support, Inc.*, No.
 4 3:13-cv-00203-MMD-VPC, 2014 WL 293438, at *1 (D. Nev. Jan. 24, 2014). As explained
 5 below, none of the causes of action alleged therein satisfies that standard.

6 1. Jurisdiction and Venue.

7 It is well-established that third-party complaints must independently satisfy jurisdictional
 8 and venue requirements. See, e.g., *Marseilles Hydro Power, LLC v. Marseilles Land & Water*
 9 Co., 299 F.3d 643, 650 (7th Cir. 2002) (finding that proposed third-party complaints must not
 10 "contravene customary jurisdictional and venue requirements"); *Lehman v. Revolution Portfolio,*
 11 *LLC*, 166 F.3d 389, 395 (1st Cir. 1999) (same). Defendant's complaint against Nancy Bridge
 12 fails to establish personal jurisdiction, proper venue, and subject matter jurisdiction. It is
 13 uncontested that Nancy Bridge is a citizen of New York. See Dkt. No. 30, Exh. A at ¶11.
 14 Tellingly, Defendant makes no assertion as to this Court's personal jurisdiction over Nancy
 15 Bridge. Defendant thus concedes that this Court lacks personal jurisdiction over Nancy Bridge.

16 Defendant's venue allegations are similarly faulty. Defendant claims, incorrectly, that
 17 venue is proper because Nancy Bridge "failed to make required payments to Credit One in this
 18 jurisdiction, potentially provided faulty information to Credit One within this jurisdiction, and
 19 Mr. Bridge [i.e., Plaintiff] brought his action against Credit One within this jurisdiction, which
 20 has caused harm to Credit One in this jurisdiction." *Id.* at ¶12. None of the foregoing, even if
 21 true, would suffice to establish either jurisdiction or venue. All of these allegations are veiled
 22 ways of stating that Defendant is a Nevada corporation headquartered in this judicial district, and
 23 point to no fact suggesting that Nancy Bridge has ever even visited this district or this state.

24 With respect to subject matter jurisdiction, Defendant claims that this Court has diversity
 25 jurisdiction. *Id.* at ¶9. Diversity jurisdiction requires that at least \$75,000, excluding costs of
 26 suit and interest, be in controversy. 28 U.S.C. § 1332. As explained above, in the very best
 27 possible world for Defendant, Defendant may conceivably be entitled to seek from Nancy Bridge
 28 recovery of statutory damages owed by Defendant to Plaintiff for unlawful calls placed between

1 January 18, 2014 and March 18, 2014. There is no indication that in those two months,
 2 Defendant made 150 or more unlawful calls to Plaintiff, which is the threshold number of calls
 3 necessary to establish the \$75,000 amount in controversy. Accordingly, Defendant fails to
 4 establish diversity jurisdiction.

5 2. Count I (Indemnity).

6 Count I for indemnification fails to satisfy the plausibility pleading standard of *Iqbal* and
 7 *Twombly*. Although Defendant purports to attach as an exhibit to its proposed third-party
 8 complaint a copy of the operative contract containing an indemnification provision, this is not
 9 the case. Defendant alleges that Nancy Bridge consented to receive auto-dialed calls from
 10 Defendant when she applied for credit in October 2012. *See* Dkt. No. 30, Exh. A at ¶2.
 11 However, the Cardholder Agreement that contains the alleged indemnification language is dated
 12 2014. *See* Dkt. No. 30, Exh. A to Exh. A at 7 (“© 2014 Credit One Bank, N.A.”). Because
 13 Defendant has failed to supply any plausible contractual basis for its alleged indemnification
 14 claim, Defendant’s allegations rest on its own *ipse dixit* and fail to pass muster under the
 15 plausibility standard.

16 3. Count II (Breach of Contract for Default).

17 Count II for breach of contract fails for the same reason. Defendant once again relies on
 18 its conclusory assertion that Nancy Bridge agreed to “pay all collection costs and any attorneys’
 19 fees that Credit One incurred as a result of her default,” Dkt. No. 30, Exh. A at ¶50, as the basis
 20 for its contract claim. Yet Defendant fails to append the contract on which it relies.
 21 Accordingly, this claim fails to meet the plausibility standard and would be dismissed under a
 22 Rule 12(b)(6) analysis.

23 In addition, Defendant’s allegation that “Ms. Bridge’s default is the proximate cause of
 24 Mr. Bridge’s suit against Credit One,” *id.* at ¶51, is as barebones an allegation as this Court is
 25 likely ever to see. Defendant provides no supporting allegations tending to demonstrate that it
 26 would plausibly be entitled to relief under some identifiable set of facts that it intends to prove.
 27 Defendant’s bare-bones pleading dressed merely in legal conclusions (“proximate cause”) should
 28 be rejected.

1 4. Count III (Breach of the Covenant of Good Faith and Fair Dealing).

2 Count III for breach of the covenant of good faith and fair dealing fails on its face. In
 3 addition to failing for the same reason Counts I and II fail (Defendant's failure to include the
 4 contract at issue), this cause of action requires allegations that "the terms of the contract are
 5 literally complied with but one party to the contract ***deliberately*** countervenes the intention and
 6 spirit of the contract." *Ruggieri v. Hartford Ins. Co. of the Midwest*, No. 2:13-cv-00071-GMN-
 7 GWF, 2013 WL 2896967, at *3 (D. Nev. June 12, 2013) (quotation omitted) (emphasis added).
 8 Defendant makes no allegations about Nancy Bridge's intentions in allegedly providing
 9 misinformation about her contact information to Defendant. Thus, this cause of action fails to
 10 state a claim.

11 5. Count IV (Negligence).

12 Count IV for negligence similarly fails. Defendant invents a "duty to not provide
 13 misleading information" as the basis for this claim. Dkt. No. 30, Exh. A at ¶58. Even if such a
 14 duty were assumed by Nancy Bridge – and there is no allegation in the proposed third-party
 15 complaint demonstrating that it was – it is beyond reason to suggest that Nancy Bridge's alleged
 16 provision of Plaintiff's phone number to Defendant is "the actual and proximate cause of
 17 [Plaintiff's] lawsuit against Credit One," *id.* at ¶60, because Defendant has only to examine its
 18 own collection calling practices to isolate the actual and the only proximate cause of Defendant's
 19 unlawful activities and by extension the present litigation. Whatever Nancy Bridge may or may
 20 not have told Defendant in early 2014 has absolutely no bearing on Defendant's subsequent
 21 decisions. Moreover, Defendant presumably has in place a mechanism for verifying the
 22 accuracy of information provided by third parties, such as cardholders, prior to engaging in
 23 conduct that may, if that information remains unverified, constitute a violation of federal law and
 24 give rise to substantial liability. If Defendant has no such procedures in place, that is simply
 25 Defendant's own shortcoming, and Defendant has no basis for pointing the finger at anyone but
 26 itself.

27

28

1 6. Count V (Fraud).

2 Count V for fraud is subject to the heightened pleading standard of Rule 9(b), and does
 3 not even come close to satisfying that Rule's particularity requirement. *See, e.g., TransFresh*
 4 *Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009 (N.D. Cal. 2012). Pleading fraud with
 5 particularity requires a showing of the "who, what, when, where, and how" of the alleged fraud.
 6 *Id.* at 1017. As noted, Defendant fails to append to its proposed third-party complaint the
 7 document(s) forming the basis of its allegations that Nancy Bridge consented to receive any calls
 8 at any number (including Plaintiff's cellular telephone number). That failure alone demonstrates
 9 that Count V fails. But the speculative leaps Defendant must make to create the impression that
 10 it is pleading fraud with particularity are worth examining. To take one example, Defendant
 11 alleges, without any supporting or accompanying detail, that "Ms. Bridge knew or should have
 12 known that Credit One would use [Plaintiff's] phone number to contact her in the future and,
 13 thus, she intended Credit One to act on this information." Dkt. No. 30, Exh. A at ¶65. Although
 14 the allegation follows ordinary grammatical and syntactical rules, it is completely bereft of sense:
 15 according to Defendant, if Nancy Bridge called Defendant using Plaintiff's phone (which she did
 16 not), she must have intended for Defendant to put the phone number associated with that phone
 17 in its dialing system and to begin making harassing auto-dialed calls to it, with no human
 18 intervention to confirm that the number does, in fact, lead to contact with Nancy Bridge – *despite*
 19 *the fact that a federal law prohibits exactly this practice.* Of course, placing a phone call (from
 20 any phone or device), alone and in itself, says nothing about anyone's intentions, except perhaps
 21 about the intention to place a call. Defendant's assertion to the contrary is devoid of foundation
 22 in both law and logic.

23 7. Count VI (Negligent Misrepresentation).

24 Count VI for negligent misrepresentation also fails. Negligent misrepresentation claims
 25 sound in fraud and thus are subject to Rule 9(b)'s particularity requirement. *See, e.g., Neilson v.*
26 Union Bank of Calif. N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (noting it is "well-
 27 established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must
 28 meet Rule 9(b)'s particularity requirements."). Negligent misrepresentation also requires not

only a deceptive statement but also an “intent to induce another’s reliance.” *Id.* For the reasons already stated with respect to Count V for fraud, Defendant’s Count VI for negligent misrepresentation fails.

8. Count VII (Declaratory Judgment).

5 Count VII for declaratory judgment, finally, fails disastrously. First, Defendant provides
6 no basis for its request for declaratory relief – no statutory authority, for example. Second, and
7 more importantly, the purported “declaratory judgment” Defendant seeks is a statement of Nancy
8 Bridge’s liability for money owed to Defendant based exclusively on alleged past tortious acts.
9 However, this is not an appropriate form of declaratory relief because it is purely retrospective.
10 See, e.g., *Khalsa v. Hali*, No. 5:13-cv-03575-PSG, 2014 WL 3883713, at *2 (N.D. Cal. Aug. 6,
11 2014) (“no basis for declaratory relief exists where only past wrongs are involved”).
12 Accordingly, Defendant cannot seek declaratory relief and Count VII fails.

13 || IV. CONCLUSION

14 For all of the foregoing reasons, Defendant's Motion should be denied in its entirety.

15 || Dated: February 23, 2015

By: /s/ Adam J. Levitt
Adam J. Levitt (admitted *pro hac vice*)
GRANT & EISENHOFER P.A.
30 North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Tel: (312) 214-0000

Diane T. Zilka (admitted *pro hac vice*)
Kyle J. McGee (admitted *pro hac vice*)
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, Delaware 19801
Tel: (302) 622-7000

Leonard H. Stone (Bar No. 5791)
SHOOK & STONE CHTD.
710 South Fourth Street
Las Vegas, Nevada 89101
Tel: (702) 385-2220

Counsel for Plaintiff and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015, I caused the foregoing document and all accompanying documents to be filed on the Court's CM/ECF filing system, which notified all counsel of record of such filing.

Dated: February 23, 2015

By: /s/ Adam J. Levitt
Adam J. Levitt